# ARKANSAS COURT OF APPEALS

DIVISION III
**No.** CA08-1509

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| LONNIE BARBER & NANCY BARBER<br>APPELLANTS<br><br>V.<br><br>ALLEN WOLF<br>APPELLEE | **Opinion Delivered** June 3, 2009<br><br>APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CV 2007-997 III]<br><br>HONORABLE DAVID B. SWITZER, JUDGE<br><br>AFFIRMED |

**DAVID M. GLOVER, Judge**

Appellants, Lonnie and Nancy Barber, filed a petition to quiet title and for an order of ejectment, requiring appellee, Allen Wolf, to remove a gate that obstructed passage over a portion of Amanda Place and a fence that was erected along his property line. Following the trial, the trial court denied the petition, concluding that the evidence did not support the finding of a prescriptive easement nor the existence of a public road. Appellants raise three points of appeal: 1) the public has acquired a right of unrestricted use of Amanda Place, 2) appellants have acquired a prescriptive right to the use of Amanda Place, 3) the circuit court erred when it denied appellants' petition for ejectment. We affirm this fact-intensive case.

*Standard of Review*

In *Boyd v. Roberts*, 98 Ark. App. 385, 390, 255 S.W.3d 895, 898 (2007), our court explained:

> The standards governing appellate review of an equity matter are well established. Although this court reviews equity cases de novo on the record, we do not reverse unless we determine that the trial court's findings of fact were clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id.*

*Testimony*

Lonnie Barber, one of the appellants, testified that he owns three and one-third acres on Amanda Lane. He stated that appellee Wolf installed the gate where appellee's and Barber's land come together, which is near the bend in the road where it begins to run north/south. He explained that he and his family have owned property in the area for more than forty years and that he was very familiar with the area, even though he does not live on the property and owns it for investment purposes. He testified that the portion of the road in question was built so that the ten acres lying due north of Wolf's property, which is owned by Mr. Persinger, would not be landlocked. He stated that mail delivery and trash sanitation pickup go over this portion of the road. According to him, he used the road to access his property for about twelve to fifteen years, until Wolf installed the fence; and that the "county took care of the road all these years." He also testified that "[t]he road's on my land. He says it's not, but there's 2 foot between us." Barber stated that he had seen county trucks or equipment maintain that portion of the road and that he watched them when he was a kid, years ago when it wasn't chipped and sealed but was graded.

He acknowledged in pertinent part on cross-examination:

> I am claiming that I haven't known of any other member of the public besides Mr. Persinger and his family and me and my family that ever used that tail-end portion

of Amanda Place. That's the only people that's had land up there. I guess is [sic] whoever had land up there got to use it.

I have not had sanitation service along this portion of Amanda Place. I had no need for any there, but it was there for public if I'd had it. I haven't had mail service there. If I'd put a mailbox up there I would've had mail, but I didn't have no need for mail service there.

W.J. Persinger testified that he owns property in the area to the north of Wolf and Barber and has owned his property since 1985. He testified that he does not access his property from the south by Wolf's house but enters his property via the "new road" that was built in the 1960s. By his testimony, he entered from the south until the Gillilands bought the property now owned by Wolf; that Gilliland blocked the road; and that he didn't want to get in a hassle with Gilliland because Gilliland was sick. Persinger explained:

> I did have opportunity to see work that was being done out there by the county on Amanda Road. They graded Amanda Road. They

didn't just grade the portion that ran east and west. They graded all the way up to Mr. Wolf's house — they used to. I don't know how long they did it, but since I moved there is all I can speak to. And '85 is when I moved there. . . .

He then testified in pertinent part on cross-examination:

> They graded up as far as Mr. Wolf's house. They didn't grade further than that, because that was that section where I started going through the woods to go up. I've marked a blue line on this plat, and that's the road I'm talking about. ....
>
> I quit using Amanda Place back when Mr. Gilliland was sick. The county graded right to here (INDICATING), to the best of my memory. (Put X where county grading ended). There was an old fence that ran along the east side of the road. That would've been between what's now Mr. Wolf's property and what's now Lonnie Barber's property.
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> . . . .
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> It was about two years after the Gillilands bought and moved in that I quit using that road. But it might not have been that long. It's been 28 years ago.
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> I did not ever receive mail up this road, up any portion of Amanda Place. We didn't have sanitation back then. The county maintained it for a ways by grading. It was paved after I quit having anything to do with it. I don't know of anyone else who used that last little section of road where you turn in to go to Wolf's other than Mr. Wolf and his predecessors in ownership.

Persinger remembered an old fence running along the road but did not remember any "drive outs" or driveways crossing that fence and going into what is now Barber's property.

Harold Tankersley, a former road grader for Garland County, testified that he started working for the county in 1968 and worked at that job for seventeen years. He stated that he was familiar with the street named Amanda Place; that he worked on the portion of it "where it bends and goes northward"; that the first time he did work there was probably in 1973; and that he worked on that part of Amanda Place until he retired in 1993. Tankersley recalled that he was already retired when the county blacktopped the road and that the county still patched it if holes develop in it. On cross-examination, he confirmed that he also worked on "a little road to the right-hand side of the old house out there" until he retired in 1993 but

that he did not know what happened after then. He also acknowledged the following:

> Yesteryears they did sometimes grade people's private driveways as a courtesy. You don't always know if it's a private driveway or a county road. You just turn it in. At the time I was working that end, you didn't have to do all that private stuff you do now. It would've been okay for the graders to have graded the driveway just as a courtesy to the taxpayer. You could go wherever they had—they—I guess you'd call it "courtesy." I was just grading the same route that somebody before had been grading. Donald Spivey had been working that area for years. But at that time it was not Amanda Place; it was just a county road grading.
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> At one time we were grading up where they had a trailer out there. An old trailer where we used to grade up to. I just thought I was grading the same road that comes all the way off of seven—171. You don't have any way of knowing whether it was private road or county.

Louis Barber, Lonnie Barber's brother, testified that he used to own the property now owned by Mr. Wolf and that he owned it just before the Farrs. He said that the part of Amanda Lane that goes north and south was there when he owned the property. According to him, he started living on that property in 1975 or 1976 in the same spot where Wolf lives now and that "[t]he county was maintaining the road, to the best of my knowledge, the whole time." He explained that his dad "cut the road to go up to what Persinger owns now. . . . Then at some point after that the county began grading that road." He testified that the county was grading it in 1976.

Don Barber, another brother, testified that he was familiar with the property because he owns property "right next door to Mr. Wolf and Lonnie." He testified that he had been familiar with the north-south section of Amanda Place for quite a period. He denied that his father cut the road, explaining that his father gave Miss Hill an easement, acknowledging that it was not in writing nor recorded, and stating that was when they "cut the road." He had

seen his brother access his property from the disputed portion of the road. He said that the county worked on that section of Amanda Place when Gilliland and Persinger got in a fuss about it, and that Persinger abandoned the easement when he learned that Gilliland was sick. He acknowledged that he had not received mail using the tail end of Amanda Place and that all of the mailboxes were "down there a quarter mile up Amanda Place." He also acknowledged that he had not had sanitation pick up using that last tail-end portion of Amanda Place.

Wolf then began his defense with the testimony of Ken Spurlin, a professional surveyor who prepared a survey for Lonnie Barber on October 24, 2006. Spurlin explained that the fence in question was "entirely within Mr. Wolf's property," and that he did not find any evidence of a driveway or roadway leading from the tail end of Amanda Place (located on Wolf's property) over into the Barber property.

Judith Gilliland testified that she sold the property to Wolf in 2003; that she and her late husband had bought it in 1987 and lived there until selling it to Wolf; and that she was familiar with Amanda Place. She testified that the portion of Amanda Place on her property was used as their driveway from 1987 to 2003. She said that she, her family, and their invitees were the only ones who used that portion of the road; that she was not aware of anyone else using it at all during that period of time; that Persinger tried to use that portion of the road, but stopped "right away" when he realized it was on their property; that this was in the spring of 1987; that there was no reason for anyone else to use it; and that she never knew of the Barbers using it.

She recalled that at some point in the 1990s she came home from work one day and the road had been paved. She was concerned because the paving had occurred on her property. "Nothing happened" after it was paved, and no one tried to make public use of the road. She explained that her water meter was "way down there at that first curve of Amanda Place," just barely inside her land; that the private water line that they paid for ran on up to their house; that the water meter was not on Amanda Place; that their mail service was "way down" at the corner at the Lonsdale Road; that it was about a mile away from their house; and that sometime later, the mailman told them they could move the mailbox up to their house and they did. She was aware the county had occasionally graded the road but stated that the road still had potholes in it until it was paved. She did not remember the county ever doing anything like patching or upkeep. She said that to the best of her knowledge, use of the road by Persinger and his family and guests ended shortly after she and her husband bought the property, and she was not aware of anyone else using that end of Amanda Place.

Appellee, Allen Wolf , testified that he purchased his property from Ms. Gilliland in June of 2003; that at the time of purchase, there was a paved road leading to the front door; that it was in pretty bad shape with a number of potholes; that to his knowledge, the county has not been on that section of road since he has lived there; that he has done all of the patchwork; that he erected the fence in question in January or early February 2007; that his water meter is located at the first bend where Amanda Place comes from the east and makes a turn north; that his mailbox is in front of his house; and that garbage pickup is in front of

his house also.

*Discussion*

*1) The public has acquired a right of unrestricted use of Amanda Place.*

*a. The county has maintained Amanda Place for over seven years.*
*b. Amanda Place has been used for mail delivery and trash pickup.*

For their first point of appeal, appellants contend that the public acquired a right of unrestricted use of Amanda Place because the county had maintained the road for over seven years and the road had been used for mail delivery and trash pickup. In making their argument under this point, appellants rely heavily upon the case of *Frazier-Hampton v. Hesterly*, 89 Ark. App. 211, 213-14, 201 S.W.3d 447, 449 (2005), where this court explained:

> Arkansas Code Annotated § 27-66-205 (Repl. 1994) gives the county judge authority to designate mail routes as county roads as follows:
>
> > The county judge, in his discretion, may designate as a county road any road that is used as a mail route or a free rural mail delivery route if the road is designated as a mail route by the proper postal authorities of the United States Government.
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> A public road does not have to be established by a formal order of the county court; instead, a prescriptive right-of-way can be established by the county working the road for a period in excess of seven years. *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984). Here, the evidence shows that the county performed maintenance and made significant improvements to the disputed section of road, including bridge construction, for a period far in excess of seven years. Moreover, unlike the situation presented in the case of *Harper v. Hannibal*, 241 Ark. 508, 408 S.W.2d 591 (1966), there is no compelling evidence to show that Walter Frazier at all times undertook to maintain constant control over the use of the road, including county work on the road, or that he installed any gates before the dispute with Charles Allen arose in 2001.
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> Furthermore, the road in question was used for over twenty years as a mail route. The fact that a road was used as a mail route is a factor to be considered in determining whether a road had become a public road through adverse use. *Lawson v. Sipple*, 319 Ark. 543, 893 S.W.2d 757 (1995). More significantly, pursuant to Ark. Code Ann. §

> 27-66-205 (Repl. 1994), a county judge may, in his discretion, designate as a county road any road that is used as a mail route or a free rural mail delivery route if the road is designated as a mail route by the proper postal authorities of the United States Government. As noted supra, the record in this case shows that the road in question was in fact so designated, and that it was employed as a mail route for over twenty years. Although it is true that mere designation and usage as a mail route is insufficient, and that there must also during the period of such usage be an order after notice in which the county judge declares the road to be a county road, *see Arkansas Game & Fish Commission v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987), such an order was in fact entered in the present case. Given the extent, duration, and conspicuousness of the public maintenance and use as a mail route, we cannot say that the county judge abused his discretion in entering this order, and we therefore affirm. *See Johnson v. Wylie*, 284 Ark. 76, 679 S.W.2d 198 (1984).

At the outset, it is important to distinguish the portion of Amanda Place that is at issue versus the uncontested portion of the road. The only portion of the road that is disputed is from the point at which it makes a sharp right, running north/south, and ending at appellee's house. The longer portion of the road, running east/west, is not contested. It was at the point of the sharp-right turn that appellee installed a gate across the road and constructed a fence running north and south along his property line, giving rise to this lawsuit.

Following our review of the evidence presented in this case, we are not left with a definite and firm conviction that a mistake was made by the trial court in finding that appellants did not prove that the public had acquired a right of unrestricted use of Amanda Place. Even if the county graded the property and paved it, Tankersley acknowledged that such services were often provided on private property "in yesteryears." In addition, the testimony is relatively undisputed that since the road was paved in 1993-94, there had been no more county work on the disputed portion of the road. Finally, mail and sanitation service on the disputed portion of the road has only occurred in the very recent past — not long

enough to establish a public road/prescriptive easement.

*2) Appellants have acquired a prescriptive right to the use of Amanda Place.*

For their second point of appeal, appellants contend that the trial court erred in determining that they did not demonstrate that they acquired a prescriptive easement to the portion of the road in question. We disagree.

In *Gazaway v. Pugh*, 69 Ark. App. 297, 302, 12 S.W.3d 662, 666 (2000), our court explained:

> One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been adverse to the true owner and under a claim of right for the statutory period. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998). The determination of whether the use of a roadway is adverse or permissive is a question of fact, and a chancellor's finding with respect to the existence of a prescriptive easement will not be reversed by this court unless it is clearly erroneous. *Id.* Where there is usage of a passageway over land, whether it be by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to this interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right. *Fullenwider v. Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). Moreover, the length of time and circumstances under which the roadway was opened and used are sufficient to establish an adverse use. *Zunamon v. Jones*, 271 Ark. 789, 610 S.W.2d 286 (Ark. App. 1981).

The evidence before the trial court relative to this point can be summarized briefly. It is essentially undisputed that from the time Mr. and Mrs. Gilliland bought the property in 1987 and Persinger learned that Mr. Gilliland was sick, the tail-end portion of Amanda Place located on the Gilliland/Wolf property was not used by anyone other than the Gillilands/Wolf, certainly not to the extent to establish adverse use of the road. Moreover, to the extent that there was any disputed testimony on this issue, it was within the trial court's

province to make determinations of credibility.

Because we have found no clear error in the trial court's findings with respect to the first two points of appeal, it is unnecessary to address appellants' third point of appeal in which they contend that the circuit court erred when it denied appellant's petition for ejectment.

Affirmed.

GLADWIN and GRUBER, JJ., agree.